

Amendment No. 1 to SB0326

Kelsey
Signature of Sponsor

AMEND Senate Bill No. 326*

House Bill No. 774

by deleting all language after the enacting clause and substituting instead the following:

SECTION 1. Tennessee Code Annotated, Title 35, is amended by adding Sections 2 through 19 as a new chapter 51.

SECTION 2. This chapter shall be known and may be cited as the “Revised Uniform Fiduciary Access to Digital Assets Act.”

SECTION 3. In this chapter:

(1) “Account” means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user;

(2) “Agent” means an attorney-in-fact granted authority under a durable or nondurable power of attorney;

(3) “Carries” means engages in the transmission of an electronic communication;

(4) “Catalogue of electronic communications” means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person;

(5) “Conservator” means a person appointed by a court to manage the estate of a person with a disability. “Conservator” includes a limited conservator;

(6) “Content of an electronic communication” means information concerning the substance or meaning of the communication which:

(A) Has been sent or received by a user;

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(B) Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and

(C) Is not readily accessible to the public;

(7) "Court" means any court of record that has jurisdiction to hear matters concerning personal representatives, conservators, guardians, agents acting pursuant to a power of attorney, or trustees;

(8) "Custodian" means a person who carries, maintains, processes, receives, or stores a digital asset of a user;

(9) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user;

(10) "Digital asset" means an electronic record in which an individual has a right or interest. "Digital asset" does not include an underlying asset or liability unless the asset or liability is itself an electronic record;

(11) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities;

(12) "Electronic communication" has the same meaning as defined in 18 U.S.C. § 2510(12);

(13) "Electronic communication service" means a custodian that provides to a user the ability to send or receive an electronic communication;

(14) "Fiduciary" means an original, additional, or successor personal representative, conservator, guardian, agent, or trustee;

(15) “Guardian” means a person appointed by a court to manage the estate of a minor. “Guardian” includes a limited guardian;

(16) “Information” means data, text, images, videos, sounds, codes, computer programs, software, databases, or the like;

(17) “Limited conservator” means a conservator with partial, restricted, or temporary powers;

(18) “Limited guardian” means a guardian with partial, restricted, or temporary powers;

(19) “Minor” means an unemancipated individual who has not attained eighteen (18) years of age and who has not otherwise been emancipated, and for whom a guardian has been appointed. “Minor” includes an individual for whom an application for the appointment of a guardian is pending;

(20) “Online tool” means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person;

(21) “Person” means an individual, estate, business or nonprofit entity; public corporation; government or governmental subdivision, agency, or instrumentality; or other legal entity;

(22) “Person with a disability” means an individual eighteen (18) years of age or older determined by a court to be in need of partial or full supervision, protection, and assistance by reason of mental illness, physical illness or injury, developmental disability, or other mental or physical incapacity, and for whom a conservator has been appointed. “Person with a disability” includes an individual for whom an application for the appointment of a conservator is pending;

(23) “Personal representative” means an executor, administrator, special administrator, or person that performs substantially the same function under law of this state other than this chapter;

(24) “Power of attorney” means an instrument that grants an agent authority to act in the place of a principal;

(25) “Principal” means an individual who grants authority to an agent in a power of attorney;

(26) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

(27) “Remote-computing service” means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. § 2510(14);

(28) “Terms-of-service agreement” means an agreement that controls the relationship between a user and a custodian;

(29) “Trustee” means a fiduciary with legal title to property under an agreement or declaration that creates a beneficial interest in another. “Trustee” includes a successor trustee;

(30) “User” means a person who has an account with a custodian; and

(31) “Will” includes a codicil, testamentary instrument that only appoints an executor, and instrument that revokes or revises a testamentary instrument.

SECTION 4.

(a) This chapter applies to:

(1) A fiduciary or agent acting under a will or power of attorney executed before, on, or after July 1, 2016;

(2) A personal representative acting for a decedent who died before, on, or after July 1, 2016;

(3) A conservatorship or guardianship proceeding, whether pending in a court or commenced before, on, or after July 1, 2016; and

(4) A trustee acting under a trust created before, on, or after July 1, 2016.

(b) This chapter applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(c) This chapter does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

SECTION 5.

(a) A user may use an online tool to direct the custodian to disclose or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other dispositive or nominative instrument.

(b) If a user has not used an online tool to give direction under subsection (a) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other dispositive or nominative instrument, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(c) A user's direction under subsection (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

SECTION 6.

(a) This chapter does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(b) This chapter does not give a fiduciary any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary acts or represents.

(c) A fiduciary's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under Section 5.

SECTION 7.

(a) When disclosing digital assets of a user under this chapter, the custodian may at its sole discretion:

(1) Grant a fiduciary or designated recipient full access to the user's account;

(2) Grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

(3) Provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(b) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this chapter.

(c) A custodian need not disclose under this chapter a digital asset deleted by a user.

(d) If a user directs or a fiduciary requests a custodian to disclose under this chapter some, but not all, of the user's digital assets, the custodian need not

disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

- (1) A subset limited by date of the user's digital assets;
- (2) All of the user's digital assets to the fiduciary or designated recipient;
- (3) None of the user's digital assets; or
- (4) All of the user's digital assets to the court for review in camera.

SECTION 8. If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the personal representative of the estate of the user the content of an electronic communication sent or received by the user if the representative gives the custodian:

- (1) A written request for disclosure in physical or electronic form;
- (2) A certified copy of the death certificate of the user;
- (3) A certified copy of any of the following: the letters of administration or letters testamentary appointing the personal representative, a small-estate affidavit under title 30, chapter 4, or a court order;
- (4) Unless the user provided direction using an online tool, a copy of the user's will, trust, power of attorney, or other dispositive or nominative instrument evidencing the user's consent to disclosure of the content of electronic communications; and
- (5) If requested by the custodian:
 - (A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;
 - (B) Evidence linking the account to the user; or

(C) A finding by the court that:

(i) The user had a specific account with the custodian, identifiable by the information specified in subdivision (5)(A);

(ii) Disclosure of the content of electronic communications of the user would not violate 18 U.S.C. §§ 2701 et seq., 47 U.S.C. § 222, or other applicable law;

(iii) Unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

(iv) Disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

SECTION 9. Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the representative gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) A certified copy of the death certificate of the user;

(3) A certified copy of any of the following: the letters of administration or letters testamentary appointing the personal representative, a small-estate affidavit under title 30, chapter 4, or a court order; and

(4) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) Evidence linking the account to the user;

(C) An affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or

(D) A finding by the court that:

(i) The user had a specific account with the custodian, identifiable by the information specified in subdivision (4)(A); or

(ii) Disclosure of the user's digital assets is reasonably necessary for administration of the estate.

SECTION 10. To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) An original or a copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(B) Evidence linking the account to the principal.

SECTION 11. Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

- (1) A written request for disclosure in physical or electronic form;
- (2) An original or a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;
- (3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and
- (4) If requested by the custodian:
 - (A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
 - (B) Evidence linking the account to the principal.

SECTION 12. Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

SECTION 13. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

- (1) A written request for disclosure in physical or electronic form;
- (2) A certified copy of the trust instrument or a certification of the trust under § 35-15-1013, that includes consent to disclosure of the content of electronic communications to the trustee;
- (3) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and
- (4) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account;
or

(B) Evidence linking the account to the trust.

SECTION 14. Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) A certified copy of the trust instrument or a certification of the trust under § 35-15-1013;

(3) A certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(4) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account;
or

(B) Evidence linking the account to the trust.

SECTION 15.

(a) After an opportunity for a hearing under title 34, chapter 1, the court may grant a guardian or conservator access to the digital assets of a minor or person with a disability.

(b) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a guardian or conservator the catalogue of electronic communications sent or received by a minor or person with a disability and any

digital assets, other than the content of electronic communications, in which the minor or person with a disability has a right or interest if the guardian or conservator gives the custodian:

- (1) A written request for disclosure in physical or electronic form;
- (2) A certified copy of the court order that gives the guardian or conservator authority over the digital assets of the minor or person with a disability; and

(3) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the minor or person with a disability; or

(B) Evidence linking the account to the minor or person with a disability.

(c) A guardian or conservator with general authority to manage the assets of a minor or person with a disability may request a custodian of the digital assets of the minor or person with a disability to suspend or terminate an account of the minor or person with a disability for good cause. A request made under this section must be accompanied by a certified copy of the court order giving the guardian or conservator authority over the property of the minor or person with a disability.

SECTION 16.

(a) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

- (1) The duty of care;
- (2) The duty of loyalty; and
- (3) The duty of confidentiality.

(b) A fiduciary's authority with respect to a digital asset of a user:

(1) Except as otherwise provided in Section 5, is subject to the applicable terms of service;

(2) Is subject to other applicable law, including copyright law;

(3) Is limited by the scope of the fiduciary's duties; and

(4) May not be used to impersonate the user.

(c) A fiduciary with authority over the property of a decedent, minor, person with a disability, principal, or settlor has the right to access any digital asset in which the decedent, minor, person with a disability, principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, minor, person with a disability, principal, or settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including title 39, chapter 14, part 6.

(e) A fiduciary with authority over the tangible personal property of a decedent, minor, person with a disability, principal, or settlor:

(1) Has the right to access the property and any digital asset stored in it; and

(2) Is an authorized user for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including title 39, chapter 14, part 6.

(f) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(g) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(1) If the user is deceased, a certified copy of the death certificate of the user;

(2) A certified copy of the letters of administration or letters testamentary appointing the personal representative; a certified copy of the small-estate affidavit under title 30, chapter 4; a certified copy of a court order; an original or a copy of a power of attorney; or a certified copy of the trust instrument or a certification of the trust under § 35-15-1013, giving the fiduciary authority over the account; and

(3) If requested by the custodian:

(A) A number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) Evidence linking the account to the user; or

(C) A finding by the court that the user had a specific account with the custodian, identifiable by the information specified in subdivision (3)(A).

SECTION 17.

(a) Not later than sixty (60) days after receipt of the information required under Sections 8 through 16, a custodian shall comply with a request under this chapter from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(b) An order under subsection (a) directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. § 2702.

(c) A custodian may notify the user that a request for disclosure or to terminate an account was made under this chapter.

(d) A custodian may deny a request under this chapter from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(e) This chapter does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this chapter to obtain a court order which:

(1) Specifies that an account belongs to the minor, person with a disability, principal, or settlor;

(2) Specifies that there is sufficient consent from the minor, person with a disability, principal, or settlor to support the requested disclosure; and

(3) Contains a finding required by law other than this chapter.

(f) A custodian and the custodian's officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this chapter.

SECTION 18. In applying and construing this Revised Uniform Fiduciary Access to Digital Assets Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 19. This chapter modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act (15 U.S.C. §§ 7001 et seq.), but does not modify, limit, or supersede Section 101(c), Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001(c)), or authorize electronic delivery of any of the notices described in Section 103(b), Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7003(b)).

SECTION 20. Tennessee Code Annotated, Section 39-14-602, is amended by adding the following new subsection:

(e) Any person who accesses, causes to be accessed, or attempts to access a digital asset pursuant to the Revised Uniform Fiduciary Access to Digital Assets Act, compiled in title 35, chapter 51, is not in violation of this part.

SECTION 21. Tennessee Code Annotated, Section 34-6-109, is amended by adding the following as a new subdivision:

(23) Access any catalogue of electronic communications sent or received by the principal, and any other digital asset in which the principal has a right or interest, pursuant to the Revised Uniform Fiduciary Access to Digital Assets Act, compiled in title 35, chapter 51. For purposes of this subdivision (23), “catalogue of electronic communications” and “digital asset” have the same meaning as defined in the Revised Uniform Fiduciary Access to Digital Assets Act, compiled in title 35, chapter 51;

SECTION 22. Tennessee Code Annotated, Title 34, Chapter 6, Part 1, is amended by adding the following as a new section:

34-6-112. Subject to the Revised Uniform Fiduciary Access to Digital Assets Act, compiled in title 35, chapter 51, if any power of attorney expressly grants an attorney-in-fact or other agent authority over the content of an electronic communication of the principal, then the attorney-in-fact or other agent shall have the power and authority to access the content of an electronic communication that the custodian is permitted to disclose under the Electronic Communications Privacy Act (18 U.S.C. § 2702(b)). For purposes of this section, “content of an electronic communication,” “custodian,” and “electronic communication” have the same meaning as defined in the Revised Uniform Fiduciary Access to Digital Assets Act, compiled in title 35, chapter 51.

SECTION 23. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or

applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 24. This act shall take effect July 1, 2016, the public welfare requiring it.